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MICHAEL RODAK, JR.,

No. 73-1173

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH HORTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issues are whether the arrest of petitioner was based on probable cause and whether the subsequent search of his automobile was lawful.

Following a jury-waived trial in the United States District Court for the Western District of Texas, petitioner and a co-defendant, Willie Jordan, were convicted of having possessed in excess of three pounds of heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to ten years' imprisonment, with a special parole term of ten

years. His conviction was affirmed on appeal (Pet. App.).[1]

On September 1, 1972, in Chicago, Illinois, U.S. Customs Agent Diogenes Galanos received a telephone call from an individual who refused to identify himself. The individual informed Galanos that one Willis Minnieweather and another black male were en route from Chicago to El Paso, Texas, and intended to make arrangements there to purchase a substantial quantity of smuggled heroin and transport it back to Chicago. He further advised that the individuals were driving a black and brown 1966 Oldsmobile with Illinois license BM 1390 (Tr. 7–9, 13, 40). Agent Galanos subsequently learned that the license was issued for a 1967 Buick in the name of Willis Minnieweather (Tr. 8). He then transmitted the information to U.S. Customs Agent A. L. Fears in El Paso (Tr. 8, 40).

Upon receiving this information, Agent Fears learned that Minnieweather was staying at the Travel Lodge Motel in El Paso. He learned from the manager that co-defendant Jordan was registered in three rooms at the motel and had been observed in the 1966 Oldsmobile. He also learned that during their stay at the motel the men placed several long distance phone calls to Chicago (Tr. 17–18, 41–42, 46–47). An intermittent surveillance of the automobile was established. It was continued for a brief period on September 3, but contact was lost and never regained. The auto-

[1] The court of appeals concluded that the evidence was insufficient to support co-defendant Jordan's conviction and reversed with directions that a judgment of acquittal be entered as to him.

mobile was never seen again. It was then learned that Minnieweather and Jordan checked out of the motel on that date (Tr. 43–44).

On September 11, 1972, Agent Galanos was again contacted by the anonymous informant, who advised that the people he had previously mentioned had returned to El Paso to pick up a quantity of heroin to be transported to Chicago. Galanos relayed this information to Fears (Tr. 9, 48). Agent Fears thereupon checked the local hotels and learned that Jordan and petitioner Horton were staying at the Downtowner Motor Lodge (Tr. 49). At 6:00 p.m., petitioner took a taxi from the Downtowner to the Rodeway Inn, where he entered and remained at the Knights Club for a brief period, subsequently returning to the Downtowner (Tr. 51). Shortly thereafter, petitioner and Jordon went to the Knights Club by taxi. They remained a short while and returned to the hotel (Tr. 52–53).

At 8:15 p.m., petitioner took a taxi to the Airways Holiday Inn, where he stood in front of the entrance to the Flame Room for about thirty minutes. At the time he was carrying a gray attache case (Tr. 53–54). Thereafter, petitioner took a taxi to the Midtown Holiday Inn, where he stood for a while at the entrance to the motel. He was still carrying the attache case (Tr. 54). After a brief period, he was joined by Jordan, who arrived in a 1971 Chrysler. The men then walked to a service station, where Jordan placed two telephone calls (Tr. 55–56, 101–103). After making the calls, they drove in the Chrysler to the Air-

ways Holiday Inn, where petitioner again stood in front of the Flame Room for a short while (Tr. 56). Thereafter, they departed and drove onto an interstate highway, where the surveillance was discontinued (Tr. 56).

The next day (September 12) at approximately 3:00 p.m., petitioner and Jordan, accompanied by two females, arrived at the Knights Club. Petitioner entered the club and Jordan entered the hotel through the main entrance. Once inside, petitioner went to a booth where a Mexican male, who had been there for about an hour, was seated. The two spoke for several minutes. The Mexican man then left the club through a rear entrance, followed a few minutes later by petitioner (Tr. 57–59, 95–97). Petitioner then returned, and he and Jordan departed with the women in the Chrysler. They left the Chrysler at a service station and took a taxi to El Paso International Airport (Tr. 58–60). Two agents remained with the Chrysler (Tr. 98–99). The taxi was stopped and searched at the airport. The men were frisked, and the women's purses were searched. Other than the key to the Chrysler, received from petitioner, nothing was seized (Tr. 61–62).

In response to questioning at the time of his arrest, petitioner identified himself and stated that he and the others were returning to Chicago by commercial airliner (Tr. 61–62). Agent Fears then asked who owned the Chrysler left at the service station, and petitioner responded that it was his (Tr. 62). Agent Fears then advised petitioner that the agents intended to search the Chrysler and asked whether

petitioner had any objection. Petitioner said he did not object (Tr. 62). Everyone then returned to the service station, where petitioner again identified the automobile as his and stated that he had no objection to its being searched (Tr. 63). (Actually, the Chrysler belonged to Jordan, as the registration papers, subsequently seized, revealed (Tr. 83).) Each individual was asked to identify his luggage, and, when asked who owned the attache case, petitioner responded that it was his. Upon request, petitioner produced the keys to the case (Tr. 63). It was opened and over three pounds of heroin was discovered therein (Tr. 64). At trial, Agent Fears testified that the seized case was similar to that which he had earlier observed in petitioner's possession (Tr. 54–55).

Following the seizure, the defendants were fully advised of their rights (Tr. 65–66). Subsequently, at the police station, petitioner was asked whether he wished to make a statement. He then informed Agent Fears that he had purchased the heroin and that the two female companions were ignorant of the entire transaction. With respect to Jordan, he responded equivocally, finally indicating that he believed Jordan had known "what was going on" (Tr. 67). Petitioner was again interviewed later that day. He informed the agent that he had purchased the heroin with his money and that he had intended to take it to Chicago (Tr. 68–69). He explained that he had gone to the airport to meet Minnieweather, who was expected to arrive around 5:00 p.m., that Minnieweather had been in El Paso with them the previous day and had flown back to Chicago, and that he and Minnieweather were

planning to drive back to Chicago in the Chrysler (Tr. 69).

Jordan advised the agents that the two women had driven the Chrysler to El Paso from Chicago and that Horton and Minnieweather had flown to El Paso, where everyone had met at the Downtowner Motor Lodge. While there, a Mexican man had visited petitioner and the two had conversed out of his presence (Tr. 70). Jordan also stated that he knew Minnieweather and that Minnieweather had come to El Paso at least twice previously in order to arrange a narcotics purchase (Tr. 71).

1. Petitioner contends that his arrest was not based upon probable cause because the reliability of the informant was not shown. It has never been held, however, that law enforcement officials may not rely upon information received from an anonymous source to support probable cause. Rather, where the reliability of the informant is unknown, the question is whether there is a "substantial basis" for crediting the "tip" anonymously received. *Jones* v. *United States*, 362 U.S. 257; *United States* v. *Harris*, 403 U.S. 573, 578–583. Where the information, initially marked by no apparent indicia of reliability, is sufficiently corroborated by "other sources of information," the reliability of the information is demonstrated and probable cause established. *Jones* v. *United States, supra*, 362 U.S. at 271; *United States* v. *Harris, supra*, 403 U.S. at 580–581; see *Draper* v. *United States*, 358 U.S. 307.

Here, the information received from the anonymous source triggered an investigation which pro-

vided a "substantial basis" for crediting the information that Minnieweather and another had come to El Paso from Chicago to obtain a quantity of heroin. The information received with respect to the first trip to El Paso was corroborated to the extent that the agents learned that Minnieweather and Jordan had in fact come to El Paso in the automobile described. While the initial surveillance was unproductive, surveillance of the activities of petitioner and Jordan with respect to the second tip received amply corroborated the informant's information. Surely it was reasonable for the agents to infer from petitioner's behavior—particularly his having traveled from one motel to another; standing, at one time for thirty minutes, outside the entrances while carrying an attache case; and later meeting with a man at the Knights Club and thereafter following him through the rear entrance—that petitioner was attempting to make a contact and did make the contact, after a few frustrated attempts, for illicit purposes, and that the attache case was intended to be and was used to transport the contraband.

Moreover, even if the initial detention of petitioner was illegal, the only "fruit" which petitioner alleges was derived improperly from that detention was the keys to the automobile (Pet. 23). But the law enforcement officers were already aware of the location of the vehicle at the time petitioner was arrested. While they did obtain the keys from him, those keys were not essential to conduct a search of the vehicle; they merely obviated the necessity of breaking the

locks. Under these circumstances it cannot fairly be said that the evidence found during the search would not have been found but for the seizure of the keys pursuant to petitioner's arrest.

2. Petitioner's related claim is that the holding of the court of appeals that he consented to the search of the vehicle and the attache case was clearly erroneous. Petitioner concedes that the court of appeals applied the appropriate legal test in determining that he had consented to the search (Pet. 21), but he argues that on the peculiar facts here its factual ruling was erroneous. This argument, which was carefully considered and rejected by the court of appeals unanimously, is not of sufficient consequence to warrant further review, particularly since it does not relate to petitioner's guilt or innocence.

In any event, since, as we have shown, there was probable cause to believe the automobile had been used to transport contraband, it was subject to seizure without a warrant pursuant to the forfeiture provisions of 49 U.S.C. 781 and 782.[2] It is settled law, approved by implication by this Court in *Cooper* v. *California,* 386 U.S. 58, that warrantless seizures of vehicles used to transport contraband are valid if reasonable, without regard to whether a warrant could have been obtained. *United States* v. *White,* 488 F. 2d 563 (C.A. 6); *United States* v. *Stout,* 434 F. 2d 1264 (C.A. 10); *United States* v. *Francolino,* 367 F.

[2] The vehicle was forfeited pursuant to a judgment entered on February 16, 1973, in the United States District Court for the Western District of Texas.

2d 1013, 1018–1023 (C.A. 2), certiorari denied, 386 U.S. 960; *United States* v. *Troiano*, 365 F. 2d 416, 418–419 (C.A. 3), certiorari denied, 385 U.S. 958; *Sirimarco* v. *United States*, 315 F. 2d 699, 701 (C.A. 10), certiorari denied, 374 U.S. 807; *United States* v. *Young*, 456 F. 2d 872, 875 (C.A. 8); *Lockett* v. *United States*, 390 F. 2d 168, 172–173 (C.A. 9). *Burge* v. *United States*, 342 F. 2d 408, 414 (C.A. 9), certiorari denied, 382 U.S. 829. Cf. *United States* v. *Trotta*, 401 F. 2d 514 (C.A. 4), certiorari denied, 394 U.S. 908. Here, there was ample basis to believe that the Chrysler carried contraband, and thus there was probable cause to seize it.[3]

Moreover, once the attache case was discovered, it was likewise subject to seizure. Whether or not there was probable cause to believe that it contained contraband at that very moment, there was reason to believe that it had been used, or had been intended to be used, to transport heroin earlier.[4] It was thus evidence itself; moreover, it was reasonable to suppose that it may have contained tell-tail signs of its earlier use. Compare *United States* v. *Valen*, 479 F. 2d 467, petition for certiorari pending →

[3] Because the warrantless seizure here was justified by the forfeiture provisions of 49 U.S.C. 781, *et seq.*, the question presently before this Court in *Cardwell* v. *Lewis*, No. 72–1603, whether a warrantless seizure of a vehicle is lawful absent exigent circumstances, is not presented here.

[4] Given the informant's tip, coupled with their observations, the law enforcement officers had probable cause to believe that the attache case was used, or had been intended to be used, to carry the heroin on September 11–12. (See, *supra*, pp. 3–4).

(No. 72–1727) with *United States* v. *Soriano*, 482 F. 2d 469 (C.A. 5), petition of the United States for rehearing *en banc* granted.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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